

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

THERANOS, INC. and ELIZABETH HOLMES,

9 | Plaintiffs,

10 | VS.

11 FUISZ PHARMA LLC, et al.,

12 Defendants.

Case No.: C-11-05236-YGR

**ORDER GRANTING DEFENDANT JOHN R.  
FUISZ'S MOTION TO DISMISS AND GRANTING  
IN PART AND DENYING IN PART DEFENDANTS  
FUISZ PHARMA LLC, RICHARD C. FUISZ,  
AND JOSEPH M. FUISZ'S MOTION TO DISMISS**

14 Plaintiffs Theranos, Inc. (“Theranos”) and Elizabeth Holmes (“Holmes”) (collectively,  
15 “Plaintiffs”) filed this action on October 26, 2011 against Defendants Fuisz Pharma LLC (“Fuisz  
16 Pharma”), John R. Fuisz (“Attorney John”), Richard C. Fuisz (“Richard”), and Joseph M. Fuisz  
17 (“Joseph”) (collectively, “Defendants”) alleging various patent and state law claims. Specifically,  
18 Plaintiffs allege ten claims for: (1) correction of inventors pursuant to 35 U.S.C. section 256 against  
19 Fuisz Pharma, Richard, and Joseph; (2) declaratory judgment based on the invalidity and  
20 unenforceability of U.S. Patent No. 7,824,612 (“612 Patent”) against Fuisz Pharma; (3) unjust  
21 enrichment and restitution against Fuisz Pharma, Richard, and Joseph; (4) breach of fiduciary duties  
22 against Attorney John; (5) aiding and abetting breach of fiduciary duties against Attorney John,  
23 Richard, and Joseph; (6) legal malpractice against Attorney John; (7) unfair competition and unfair  
24 business practices against all Defendants; (8) breach of contract against Attorney John; (9) inducing  
25 breach of contract and tortious interference with contractual relations against Richard and Joseph; and  
26 (10) civil conspiracy against Richard, Joseph, and Attorney John.

27 On February 27, 2012, Attorney John filed a Motion to Dismiss Claims Against John R. Fuisz  
28 Pursuant to Fed. R. Civ. Proc. 12(b)(6). (Dkt. No. 62 (“First Motion”)). The First Motion seeks

1 dismissal of all claims asserted against Attorney John on the grounds that they are time-barred.  
2 Plaintiffs filed an Opposition to Motion to Dismiss Claims Against John R. Fuisz on March 12, 2012.  
3 (Dkt. No. 66 (“First Opp.”).) Attorney John filed his Reply in Support of his Motion to Dismiss on  
4 March 19, 2012. (Dkt. No. 70 (“First Reply”).)

5 On March 9, 2012, Fuisz Pharma, Richard, and Joseph (collectively, “Fuisz Pharma  
6 Defendants”) filed a Motion to Dismiss Claims Against Fuisz Pharma LLC, Richard C. Fuisz, and  
7 Joseph M. Fuisz Pursuant to Fed. R. Civ. Proc. 12(b)(6) and 9(b). (Dkt. No. 65 (“Second Motion”).)  
8 The Second Motion seeks dismissal of all claims against the Fuisz Pharma Defendants on the grounds  
9 that the federal claims are improperly pled and duplicative, and the state law claims are either  
10 superseded by state statute or time-barred. Plaintiffs filed an Opposition to Motion to Dismiss Claims  
11 Against Fuisz Pharma LLC, Richard C. Fuisz, and Joseph M. Fuisz on March 23, 2012. (Dkt. No. 72  
12 (“Second Opp.”).) The Fuisz Pharma Defendants filed their Reply in Support of their Motion to  
13 Dismiss on March 30, 2012. (Dkt. No. 74 (“Second Reply”).) Hearings on the First and Second  
14 Motions took place on April 3 & 24, 2012, respectively. (Dkt. Nos. 75 & 78.)

15 Having carefully considered the papers submitted and the pleadings in this action, and for the  
16 reasons set forth below, the Court hereby:

- 17 • **GRANTS** the First Motion to Dismiss the fourth, fifth, sixth, seventh, eighth, and tenth  
18 claims against John Fuisz, **WITH LEAVE TO AMEND** only the seventh claim for unfair  
19 competition/unfair business practices.
- 20 • **DENIES** the Second Motion to Dismiss the first, second, and third claims for correction  
21 of inventors, declaratory judgment, and unjust enrichment/restitution, respectively.
- 22 • **GRANTS** the Second Motion to Dismiss **WITH LEAVE TO AMEND** the fifth and seventh  
23 claims for aiding and abetting breach of fiduciary duties against Richard Fuisz and  
24 Joseph Fuisz, and unfair competition/unfair business practices against Richard,  
25 Joseph, and Fuisz Pharma, respectively.
- 26 • **GRANTS WITHOUT LEAVE TO AMEND** the Second Motion to Dismiss the ninth and  
27 tenth claims for inducing breach of contract/tortious interference with contractual  
28 relations and civil conspiracy, respectively.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

This action was originally filed on October 26, 2011. (Dkt. No. 1.) A first Amended Complaint (“FAC”) was filed on February 9, 2012. (Dkt. No. 53.) The action arises from allegations that Defendants wrongfully took and used Plaintiffs’ confidential information relating to certain patent applications.

**A. The Parties and the Patent Applications**

Holmes is a named inventor on several patents and current CEO of Theranos. FAC ¶ 3. Theranos is a healthcare systems company that develops technologies used in the collection, analysis, and communication of health information. FAC ¶ 2. John is a patent attorney residing in Washington, D.C. who previously worked at a national law firm<sup>1</sup> that rendered services to Plaintiffs beginning in 2003. *Id.* ¶¶ 5 & 17–18. Joseph is Attorney John’s brother and the CEO and managing member of Defendant Fuisz Pharma LLC. *Id.* ¶ 7. Richard is the father of Attorney John and Joseph, and a member of Fuisz Pharma. *Id.* ¶ 6. While Richard and Joseph reside in California and Florida, respectively, Fuisz Pharma is an LLC formed under the laws of Delaware with its principal place of business in Florida. *Id.* ¶¶ 4 & 6–7. Fuisz Pharma “purports to be the owner” of the ’612 Patent. *Id.* ¶ 4.

In or around August 2003, Plaintiffs retained Law Firm “to provide legal services to Plaintiffs in prosecuting patent applications covering Plaintiffs’ inventions.” *Id.* ¶ 18. “Between 2003 and approximately early 2006, . . . Law Firm represented Plaintiffs in the preparation, filing, and prosecution of their domestic and international patent applications, and continued to represent Plaintiffs until around October 2008.” *Id.* The legal services provided to Plaintiffs occurred “mainly out of its office located in Washington, D.C.” but included reviewing information and materials sent by Plaintiffs from California and communicating with Plaintiffs in California. *Id.* ¶ 19. Attorneys in Law Firm’s Intellectual Property Litigation and Patent Prosecution groups (“IP Group”) had access to confidential information<sup>2</sup> contained in Plaintiffs’ files. *Id.* ¶ 20–22.

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<sup>1</sup> Because the Court does not find the identity of John Fuisz’s former law firm to be relevant for the purposes of this motion, the Court will use the term “Law Firm” to refer thereto.

<sup>2</sup> The Court uses the term “Confidential Information” to refer to Plaintiffs’ proprietary data and intellectual property, as defined in FAC ¶ 1.

1 Law Firm's services to Plaintiffs "included preparing and filing various provisional patent  
2 applications on their behalf." FAC ¶ 23. Specifically, in 2005, Law Firm drafted and filed four  
3 provisional patents for Plaintiffs ("Theranos Provisionals"), each of which included information that  
4 was confidential and proprietary to Plaintiffs. *Id.* ¶¶ 24 & 26. At that time, the information was not  
5 public. *Id.* ¶ 36. In or around early 2006, Plaintiffs hired another law firm to prepare, file, and  
6 prosecute subsequent patent applications. *Id.* ¶ 27. With that law firm, Plaintiffs filed non-  
7 provisional patent applications on March 24, 2006 that "claim priority to the Theranos Provisionals."  
8 *Id.* ¶ 28. The March 24, 2006 patent applications and the information contained therein were not  
9 publicly available until November 2006. *Id.* ¶¶ 29–30.

10 Plaintiffs allege that Richard and Joseph "wrongfully used the valuable confidential and  
11 proprietary information that Plaintiffs had entrusted to . . . Law Firm, including both the general  
12 knowledge of Plaintiffs' work and plans and specific information set forth in the Theranos  
13 Provisionals, and in other materials submitted in confidence by Plaintiffs to . . . Law Firm." *Id.* ¶ 31;  
14 *see id.* ¶ 35. One month after the Theranos Provisionals were filed, in April 2006, Richard and Joseph  
15 filed their own provisional patent application ("Fuisz Provisional"). *Id.* ¶ 32. On April 24, 2007,  
16 Richard and Joseph filed a non-provisional patent application claiming the benefit of the Fuisz  
17 Provisional. *Id.* ¶ 34. This application ultimately matured into the '612 Patent. *Id.* ¶¶ 4 & 34.

18 Plaintiffs allege that the Fuisz Provisional included "copied concepts and disclosures from the  
19 non-public Theranos Provisionals" and Confidential Information. *Id.* ¶ 37 ("The same concepts and  
20 disclosures are also found in the '612 Patent."); *see id.* ¶ 40. Holmes and others at Theranos,  
21 including Timothy Kemp ("Kemp") developed the concepts contained in their Confidential  
22 Information. *Id.* ¶¶ 38–39. "But for" Richard and Joseph's access to Confidential Information, "they  
23 would not have been able to file the Fuisz Provisional" or obtain the '612 Patent. *Id.* ¶¶ 62–63.

24 **B. Plaintiffs Discover the Fuisz Provisional and the '612 Patent**

25 Plaintiffs "first became aware" of the Fuisz Provisional in May 2008. FAC ¶ 64. Prior to that  
26 time, they had "no reason . . . to believe that [their] Confidential Information had been used by  
27 Defendants to file a patent application." *Id.* In fact, they "could not reasonably have discovered" the  
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1 Fuisz Provisional or use of Theranos Confidential Information any sooner than January 2008, when  
2 that information was made publicly available. *Id.*

3 On or about August 22, 2008, Holmes was informed that a lawyer by the name of John Fuisz  
4 was a partner at Law Firm. FAC ¶ 65. She was unable to schedule a meeting with a partner at Law  
5 Firm until September 22, 2008. *Id.* ¶¶ 65–66. On September 22, she met with two partners at Law  
6 Firm and “informed them” that Richard and Joseph “had filed an application for a patent claiming  
7 priority to the Fuisz Provisional . . . which contained concepts substantially similar to those disclosed”  
8 in Confidential Information furnished to Law Firm and the Theranos Provisionals. *Id.* ¶ 66  
9 (hereinafter, “Law Firm Meeting”). The partners responded that they would look into the matter. *Id.*  
10 ¶ 67. On or about October 28, 2008, Law Firm informed Holmes that Attorney John was Richard’s  
11 son, that he (as a member of the IP Group) had access to Theranos Confidential Information that had  
12 been provided to Law Firm, and that “at that point there was ‘nothing they could do.’” *Id.* ¶¶ 68–69  
13 (hereinafter, “Law Firm Response”). Plaintiffs allege that “[u]ntil receiving the information provided  
14 on October 28, Plaintiffs had no reason to believe that John Fuisz or the Law Firm had breached any  
15 duty to Theranos or used Theranos Confidential Information.” *Id.* ¶ 71.

16 On November 2, 2010, the U.S. Patent and Trademark Office (“PTO”) issued the ’612 Patent,  
17 identifying Richard and Joseph as inventors. FAC ¶ 72. According to Plaintiffs, “[t]his was the first  
18 time when Plaintiffs incurred any actual damages as a result of Defendants’ improper conduct.” *Id.* ¶¶  
19 72 & 74 (damage to Theranos’s ability to enjoy exclusivity of its Confidential Information and  
20 inventions based thereon); *see id.* ¶¶ 76–77.

21 Plaintiffs initiated this action on October 26, 2011. *Id.* ¶ 78. One day later, Richard and  
22 Joseph “purported to assign all their right, title, and interest to the ’612 Patent to Fuisz Pharma.” *Id.* ¶  
23 79. On November 1, 2011, Fuisz Pharma sued Theranos in U.S. District Court, District of Delaware  
24 for infringement on the ’612 Patent. *Id.* ¶ 80. On November 2, 2011, Theranos filed copied claims  
25 with the PTO setting forth how all claims in the ’612 Patent are supported by Plaintiffs’  
26 specifications. *Id.* ¶ 81.

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1 **II. DISCUSSION**2 **A. Legal Standards Under Fed. R. Civ. P. 12(b)(6)**

3 Pursuant to Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed against a defendant for  
4 failure to state a claim upon which relief may be granted. Dismissal may be based on either the lack  
5 of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.  
6 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter*  
7 *Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir. 1984). For purposes of evaluating a motion to dismiss,  
8 the court “must presume all factual allegations of the complaint to be true and draw all reasonable  
9 inferences in favor of the nonmoving party.” *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th  
10 Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly*  
11 *Enterprises*, 476 F.2d 393, 396 (9th Cir. 1973).

12 A statute of limitations defense may be raised by a motion to dismiss “[i]f the running of the  
13 statute is apparent on the face of the complaint.” *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682  
14 (9th Cir. 1980); *see Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995) (“[A]  
15 complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of  
16 facts that would establish the timeliness of the claim.”).

17 Mere conclusions couched in factual allegations are not sufficient to state a cause of action.  
18 *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802,  
19 810 (9th Cir. 1988). The complaint must plead “enough facts to state a claim [for] relief that is  
20 plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible  
21 on its face “when the plaintiff pleads factual content that allows the court to draw the reasonable  
22 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
23 129 S. Ct. 1937, 1949 (2009). Thus, “for a complaint to survive a motion to dismiss, the non-  
24 conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly  
25 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969  
26 (9th Cir. 2009). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the  
27 defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

## **B. John R. Fuisz's Motion to Dismiss (First Motion)**

Attorney John moves to dismiss all claims against him on the ground that they are time-barred under the relevant statute of limitations.<sup>3</sup> The First Motion raises three issues to be resolved. First, the Court must decide which statute of limitations applies: the one-year California statute (California Code of Civil Procedure section 340.6 [“Section 340.6”]) or the three-year District of Columbia statute (D.C. Code section 12-301(8) [“Section 12-301(8)”]). Next, the Court must decide when the statute began to run. Third, the Court must determine whether the statute was tolled.

## 1. California versus District of Columbia Statute of Limitations

Attorney John contends that California’s one-year statute for legal malpractice applies to the claims against him.<sup>4</sup> Plaintiffs counter that a conflict analysis is not necessary because Plaintiffs’ “claims are timely under both California and District of Columbia law.” First Opp. at 10. Alternatively, Plaintiffs contend that the three-year Washington, D.C. statute of limitations<sup>5</sup> should apply because, as a practicing Washington, D.C. lawyer, that jurisdiction has a greater interest than

<sup>3</sup> Plaintiffs allege claims for breach of fiduciary duties (fourth claim), aiding and abetting breach of fiduciary duties (fifth claim), legal malpractice (sixth claim), unfair competition and unfair business practices (seventh claim), breach of contract (eighth claim), and civil conspiracy (tenth claim) against Attorney John. Attorney John contends that each of the claims against him is “a variation on the same theme” of legal malpractice—*i.e.*, that he breached a duty owed to Plaintiffs by virtue of Law Firm’s legal work in 2003–2006—and thus, every claim is barred by the legal malpractice statute of limitations. First Motion at 4.

<sup>4</sup> Section 340.6(a) provides that: “[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.” Section 340.6 further provides that “in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: (1) [t]he plaintiff has not sustained actual injury [and] (2) [t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.” Cal. Code Civ. Proc. § 340.6(a)(1)–(2).

<sup>5</sup> Section 12-301(8) states that: “[e]xcept as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues: . . . (8) for which a limitation is not otherwise specially prescribed -- 3 years.”).

1 California in determining the limitations period for malpractice claims brought against Attorney John.  
 2 *Id.* at 10 n.6.<sup>6</sup>

3 The Ninth Circuit instructs that a California district court should apply the statute of  
 4 limitations that would be applied in California state court. *Deutsch v. Turner Corp.*, 324 F.3d 692,  
 5 716 (9th Cir. 2003). Here, “California applies the ‘governmental interest’ approach to conflict of law  
 6 issues.”<sup>7</sup> *Id.* at 716–17. In *Deutsch*, the Ninth Circuit specifically addressed choice-of-law issues in  
 7 applying the statute of limitations for state common law claims. *Id.* The court found that  
 8 “California’s interest in applying its own law is strongest when its statute of limitations is shorter than  
 9 that of the foreign state, because [California] has a substantial interest in preventing the prosecution in  
 10 its courts of claims which it deems to be ‘stale.’ Hence, subject to rare exceptions, the forum will  
 11 dismiss a claim that is barred by its statute of limitations.” *Id.* at 717 (internal citations and quotations  
 12 omitted).

13 Federal courts sitting in California and applying a *Deutsch* analysis consistently conclude that  
 14 California’s statute of limitations applies when faced with a choice-of-law concerns, absent a rare  
 15 exception or extraordinary interest by a foreign state to keep alive the claims. For example, in  
 16 *Gonzales v. Texaco, Inc.*, the court granted summary judgment in an action alleging that defendants’  
 17 oil-drilling operations in the Amazon rainforest caused plaintiffs’ cancer. No. C 06-02820 WHA,  
 18 2007 WL 4044319, at \*7–8 (N.D. Cal. Nov. 15, 2007). *Gonzales* examined whether California’s two-  
 19 year statute or Ecuador’s four-year statute governed. *Id.* at \*3. The court held that “[u]nder *Deutsch*,  
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21 <sup>6</sup> Plaintiffs do concede, however, that if California law applies, Section 340.6 would apply to all claims other  
 22 than the seventh claim, governed by California Business & Professions Code section 17200, *et seq.* First Opp.  
 23 at 11. There, Plaintiffs apply a four-year statute of limitations under Cal. Bus. & Prof. Code section 17208.

24 <sup>7</sup> The California Supreme Court has succinctly summarized its choice-of-law process post-*Deutsch*: the first  
 25 step of the governmental interest test is to “determine[] whether the relevant law of each of the potentially  
 26 affected jurisdictions with regard to the particular issue in question is the same or different.” *McCann v. Foster*  
*27 Wheeler LLC*, 48 Cal. 4th 68, 87 (2010) (citing *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107–08  
 28 (2006)). If there is a difference, the second step requires that “the court examine[] each jurisdiction’s interest in  
 the application of its own law under the circumstances of the particular case to determine whether a true  
 conflict exists.” *McCann*, 48 Cal. 4th at 87 (citing *Kearney*, 39 Cal. 4th at 107–08). The third step is to  
 evaluate and compare “the nature and strength of the interest of each jurisdiction in the application of its own  
 law ‘to determine which state’s interest would be more impaired if its policy were subordinated to the policy of  
 the other state’ [] and then ultimately appl[y] ‘the law of the state whose interest would be more impaired if its  
 law were not applied.’” *McCann*, 48 Cal. 4th at 88 (citing *Kearney*, 39 Cal. 4th at 107–08).

1 this order must use the statute of limitations under California law" because "California's statute of  
2 limitations is shorter than that of Ecuador's" and no exception to the general rule applied. *Id.* at \*4.  
3 The Court noted that *Deutsch* was no less applicable in cases where "plaintiffs had only fallen outside  
4 the limitations period by one or two years," rather than the delay of decades in other cases. *Id.* at \*6.  
5 Similarly, in *Hunter v. Citibank, N.A.*, which involved various claims against a group of lawyer-  
6 defendants, the court applied *Deutsch* and enforced California's one-year statute (Section 340.6) over  
7 the two-year statute in Florida and Nebraska. No. C 09-02079 JW, 2010 WL 2509933, at \*1 & 9  
8 (N.D. Cal. Feb. 3, 2010) (ultimately denying motion to dismiss on separate grounds relating to when  
9 plaintiffs discovered, or should have discovered, the facts constituting the wrongful act). *See Koken v.*  
10 *W.C.A. Service Corp., Inc.*, No. CIV. S-05-01487 FCD DAD, 2006 WL 3087098, at \*3-5 (E.D. Cal.  
11 Oct. 30, 2006) (following *Deutsch* and articulating that enforcement of California's shorter statute  
12 "would advance its underlying policies of protecting the state's residents and courts from the burdens  
13 associated with the prosecution of stale cases").

14 Plaintiffs' argument that Washington, D.C. has a strong interest in determining the length of  
15 time one has to file suit against attorneys practicing in the District of Columbia lacks persuasion. The  
16 District of Columbia has *not* enacted a specific provision setting a limitation period for legal  
17 malpractice claims. Rather, the operative statute of limitations under District of Columbia law comes  
18 from Section 12-301(8)—which imposes a generic, catch-all three-year period for any action where a  
19 limitation period "is not otherwise specially prescribed." While the District of Columbia certainly has  
20 a general interest in setting a statute of limitations that it deems fit, the lack of a specific prescription  
21 for malpractice cases stands in stark contrast to California's thoughtful and deliberate decision to  
22 impose a one-year period. Such a generic statute does not compel a finding that Washington, D.C.  
23 has expressed such an extraordinarily-strong interest to overcome California's explicit limitation on  
24 legal malpractice claims.

25 By contrast, the California Supreme Court held that "[i]n section 340.6, the Legislature  
26 established a detailed, explicit, and exclusive scheme for commencing and tolling the legal  
27 malpractice limitations periods." *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal.  
28 4th 739, 764 (1998). This scheme was intended to "reflect[] the balance . . . struck between a

1 plaintiff's interest in pursuing a meritorious claim and the public policy interests in the prompt  
2 assertion of known claims" and provided for tolling in specified situations in order to "help protect  
3 legal malpractice plaintiffs from unknowing or inadvertent forfeiture of meritorious claims." *Id.* at  
4 756 ("Legislature expressly disallowed tolling under any circumstances not stated in the statute").  
5 Because California specifically concluded that a one-year statute reflected an appropriate balance of  
6 the interests raised in legal malpractice cases, the Court finds that California's interest in applying its  
7 statute of limitations would be more significantly impaired if thwarted by the more generic District of  
8 Columbia statute. *Koken*, 2006 WL 3087098, at \*5 ("California's strong interest in applying its own  
9 law when its statute of limitations is shorter [than] that of the foreign state outweighs such an  
10 interest.") (citing *Deutsch*).

11 Under a *Deutsch* analysis, the Court therefore finds that the one-year California statute applies  
12 to the claims against Attorney John and that this case does not constitute a "rare exception"  
13 warranting application of the District of Columbia statute of limitations.<sup>8</sup>

14 **2. Commencement of the One-Year Statute of Limitations**

15 The Court must next determine when the statute began to run. The parties offer  
16 varying dates. Plaintiffs contend that the statute did not begin to run until November 2, 2010, when  
17 the '612 Patent issued and, they argue, actual damages accrued. Attorney John makes a number of  
18 alternative arguments, specifically that Section 340.6 began to run: (1) in early 2006, when Attorney  
19 John allegedly shared the Confidential Information; (2) in January 2008, when the Fuisz Provisional  
20 was published; (3) on September 22, 2008, the date of the Law Firm Meeting, asserting Plaintiffs  
21 were on inquiry notice of Attorney John's alleged wrongdoing; or (4) on October 22, 2008, the date of  
22 the Law Firm Response, arguing Plaintiffs admit they had actual notice of his wrongdoing.

23 A statute of limitations begins to run once the claim accrues. Cal. Civ. Code § 312. Each of  
24 the claims at issue requires both actual or constructive knowledge and damages. The notion that  
25 Plaintiffs had actual or constructive knowledge of Attorney John's allegedly covert actions in 2006 or

26  
27 <sup>8</sup> The result would be the same under a traditional "governmental interest" analysis, as opposed to *Deutsch*.  
28 The Court would have been required to evaluate the strength of each state's interest in the application of its  
own law to determine whose policy would be more impaired if the other state's law was applied. *McCann*, 48  
Cal. 4th at 88 (citing *Kearney*, 39 Cal. 4th at 107–08).

1 the publication in January 2008 strains credulity and the Court eliminates those arguments without  
 2 further discussion. The real issue is whether damages accrued such that the statute began to run in  
 3 September 2008, October 2008, or November 2010. *City of Vista v. Robert Thomas Sec., Inc.*, 84 Cal.  
 4 App. 4th 882, 886 (Cal. Ct. App. 2000) (“When damages are an element of a cause of action, the  
 5 cause of action does not accrue until the damages have been sustained.”).

6 The legal framework for this analysis is set forth in *Jordache Enterprises, Inc. v. Brobeck,*  
 7 *Phleger & Harrison*, in which the California Supreme Court stated:

8 Actual injury occurs when the client suffers any loss or injury legally cognizable as  
 9 damages in a legal malpractice action based on the asserted errors or omissions. . . .  
 10 [Section 340.6(a)(1)] will not toll the limitations period once the client can plead  
 11 damages that could establish a cause of action for legal malpractice.  
 12 18 Cal. 4th at 743. A client can establish the claim once it suffered “any appreciable and actual harm”  
 13 as a consequence of the attorney’s negligence and sustained “compensable” damages. *Id.* at 750 & 51  
 14 (internal citation and emphasis omitted). The court further clarified that “the existence of appreciable  
 15 actual injury does not depend on the plaintiff’s ability to attribute a quantifiable sum of money to  
 16 consequential damages,” rather that “actual injury may consist of impairment or diminution, as well  
 17 as the total loss or extinction, of a right or remedy.” *Id.* at 750. In cases where the malpractice  
 18 “results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been  
 19 actual injury regardless of whether future events may affect the permanency of the injury or the  
 20 amount of monetary damages eventually recovered.” *Id.* (internal citations omitted). “[O]nce the  
 21 plaintiff suffers actual harm, neither difficulty in proving damages nor uncertainty as to their amount  
 22 tolls the limitations period” nor “renders that injury speculative or inchoate.” *Id.* at 752 & 744. The  
 23 “particular facts of each case must be examined in light of the wrongful act or omission the plaintiff  
 24 alleges against the attorney.” *Id.* at 764.<sup>9</sup>

24 <sup>9</sup> Plaintiffs argue that the mere discovery of an attorney’s misconduct is insufficient to constitute actual injury.  
 25 First Opp. at 12. It is true that California courts have held that actual injury does not necessarily occur in all  
 26 situations at the time of the alleged malpractice. *Jordache*, 18 Cal. 4th at 764–65 (where law firm failed to  
 27 advise client that it had insurance coverage for defense of lawsuit, court determined that impairment of the right  
 28 to insurance benefits occurred after discovery of the neglect but before settlement of the insurance coverage  
 litigation); *Callahan v. Gibson, Dunn & Crutcher LLP*, 194 Cal. App. 4th 557, 574 (Cal. Ct. App. 2011)  
 (defective provisions in limited partnership agreement caused actual injury when general partner became  
 incapacitated, and the compromised future rights constituted only contingent harm until such time as those  
 rights had “some meaningful effect”); *Fritz v. Ehrmann*, 136 Cal. App. 4th 1374, 1383–84 (Cal. Ct. App. 2006)

1       Through the allegations of the complaint, Plaintiffs concede that in May 2008, they were  
 2 already “aware of the Fuisz Provisional Patent Application.” FAC ¶ 64. By September 28, 2008,  
 3 Plaintiff Holmes had become “concerned about the similarities between the Theranos Confidential  
 4 Information, including the Theranos Provisionals, and the Fuisz Provisional.” First Opp. at 20 n.13;  
 5 FAC ¶ 66. On or about October 28, 2008, Law Firm informed Plaintiffs that Attorney John was the  
 6 son of Fuisz Provisional applicant Richard, had access to Theranos Confidential Information, and that  
 7 Law Firm could not further assist her. *Id.* ¶ 69. Plaintiffs concede that up until this time, they “had no  
 8 reason to believe that [John or Law Firm] had breached any duty to Theranos or used Theranos  
 9 Confidential Information.” FAC ¶ 71. By the same token, as of October 28, 2008, Plaintiffs *did* have  
 10 reason to believe that Attorney John had taken Theranos Confidential Information and provided it to  
 11 his father and brother, who had used the information in filing the Fuisz Provisional.<sup>10</sup>

12       The question is: had damages accrued? Could Plaintiffs have recovered damages for Attorney  
 13 John’s disclosure and use of the Confidential Information which resulted in the Fuisz Provisional *or*  
 14 were Plaintiffs required to wait until a patent issued? The Court finds that Plaintiffs could have  
 15 articulated a basis for damages by October 28, 2008. Not only is it reasonable to expect that  
 16 Plaintiffs, at a minimum, paid the Law Firm for the patent work, including for keeping said  
 17 information confidential, but the act of filing the Fuisz Provisional itself impaired Plaintiffs’  
 18 ownership rights and ability to claim priority to inventions based on Theranos’s Confidential  
 19 Information. *See* First Reply at 7. While arguably true that Plaintiffs did not lose the “ability to

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20 (alleged malpractice in negotiating and drafting promissory note did not result in actual injury at time of  
 21 drafting, but would occur when the note was challenged or plaintiffs were forced to pay legal fees to defend on  
 22 the note). Plaintiffs’ cases do not address a factual situation even remotely similar to the case at hand but,  
 23 rather, address malpractice in the context of negligence. Importantly, the cases do not support the proposition  
 24 that Plaintiffs’ injury could have occurred only when “Theranos lost the ability to make, use, sell, or offer to  
 25 sell any products based on its own Confidential Information.” First Opp. at 14.

26       <sup>10</sup> Plaintiffs’ comparison of claims and concepts between the parties’ provisional applications and the ’612  
 27 Patent, as described in the FAC, further indicate that it was apparent from the Fuisz Provisional that Plaintiffs’  
 28 Confidential Information had been taken and used. *See* FAC ¶ 37 (“Fuisz Provisional Patent Application  
 copied concepts and disclosures from the non-public Theranos Provisionals, as well as from other confidential  
 information, documents, and data Plaintiffs provided to John Fuisz’s Law Firm in connection with the  
 prosecution of Plaintiffs’ patent applications.”); *id.* ¶ 40 (“The concepts and disclosures in the Fuisz Provisional  
 Patent Application and in the ’612 Patent closely track those in the Theranos Confidential Information,  
 including the Theranos Provisionals.”); *see id.* ¶¶ 41–61 & 84 (detailing how the same concepts are contained  
 within the parties’ provisional applications and the ’612 Patent).

1 make, use, sell, or offer to sell any products based on its own Confidential Information” until the ’612  
 2 Patent issued, the damages which flowed from Attorney John’s breaches are not dependent on such an  
 3 ability.

4 Based on the foregoing, the Court finds that Plaintiffs had reason to know by no later than  
 5 October 28, 2008 that Attorney John may have breached his fiduciary duties and committed  
 6 malpractice by taking and sharing Confidential Information with his family; and that actual  
 7 “appreciable” injury to their patent rights had already occurred as of that date. Thus, the one-year  
 8 statute of limitations commenced, and ran, effective October 28, 2009.<sup>11</sup> Plaintiffs did not initiate this  
 9 action until October 26, 2011, almost two years later. On this basis, the Court **GRANTS** the First  
 10 Motion to Dismiss the fourth, fifth, sixth, eighth, and tenth claims against Attorney John as time-  
 11 barred under Section 340.6.

12 **3. Extension of Section 340.6 to the Seventh Claim for Unfair Competition  
 13 and Unfair Business Practices**

14 As part of the First Motion, Attorney John moves to dismiss the seventh claim based  
 15 on Section 340.6 because the claim arises out of the same alleged acts as the claim for legal  
 16 malpractice. First Motion at 9. Plaintiffs, on the other hand, assert that the applicable statute of  
 17 limitations is four years, based on Cal. Bus. & Prof. Code section 17200, *et seq.* (“UCL”). First Opp.  
 18 at 11. While Plaintiffs may have intended to make this a UCL claim (First Opp. at 15–17), it is not  
 19 pled as such. The FAC fails to reference the Bus. & Prof. Code in its allegations and, based on its  
 20 plain language, the seventh claim appears to be a common law claim. FAC ¶¶ 131–136. A UCL  
 21 claim is distinct and separate from the common law claims underlying legal malpractice. *See* First  
 22 Reply at 12. Attorney John provides no compelling authority to the contrary.

23 Despite the language in the FAC, Plaintiffs made clear at the hearing on the First Motion that  
 24 the seventh claim is intended to be a UCL claim, which the Court takes into consideration for the  
 25 purposes of amending the claim. The Court hereby **GRANTS** the First Motion to Dismiss the seventh

26 <sup>11</sup> Plaintiffs allege that Law Firm “continued to represent Plaintiffs until around October 2008.” FAC ¶ 18; *see*  
 27 First Opp. at 22 (“When Ms. Holmes was informed on October 28, 2008, that the Firm would not assist her in  
 28 remedying any issues or mitigating any misconduct relating to the Theranos Provisionals, the representation  
 terminated.”). In light of the Court’s finding that actual injury occurred on that same date, tolling under  
 Section 340.6(a)(2) would not save the claims against Attorney John.

1 claim **WITH LEAVE TO AMEND** for Plaintiffs to properly plead this claim as a UCL claim (to the  
 2 extent a viable claim exists), to which a four-year statute would be applicable, if that was or is  
 3 Plaintiffs' intent.

4 **C. Fuisz Pharma LLC, Richard C. Fuisz, and Joseph M. Fuisz's Motion to Dismiss  
 5 (Second Motion)**

6 The Second Motion seeks dismissal of all claims filed against Fuisz Pharma Defendants.<sup>12</sup>  
 7 Specifically, they seek dismissal of: the first claim for correction of inventors against all Fuisz Pharma  
 8 Defendants; the second claim for declaratory judgment based on the invalidity and unenforceability of  
 9 the '612 Patent against Fuisz Pharma; the third claim for unjust enrichment and restitution against all  
 10 Fuisz Pharma Defendants; the fifth claim for aiding and abetting breach of fiduciary duties against  
 11 Richard and Joseph; the seventh claim for unfair competition and unfair business practices against all  
 12 Fuisz Pharma Defendants; the ninth claim for inducing breach of contract and tortious interference  
 13 with contractual relations against Richard and Joseph; and the tenth claim for civil conspiracy against  
 14 Richard and Joseph.

15 **1. Claim for Correction of Inventors under 35 U.S.C. Section 256**

16 The Court first addresses whether Plaintiffs have properly stated a claim under 35  
 17 U.S.C. section 256 ("Section 256") where the allegations require substitution of an inventor's name  
 18 due to alleged fraud as opposed to a clerical correction of a mistake.

19 Section 256 provides that "[w]henever through error a person is named in an issued patent as  
 20 the inventor, or through error an inventor is not named in an issued patent and such error arose  
 21 without any deceptive intention on his part, the Director may, on application of all the parties and  
 22 assignees, with proof of the facts and such other requirements as may be imposed, issue a certificate  
 23 correcting such error." The Federal Circuit in *Stark v. Advanced Magnetics, Inc.* analyzed *at length*  
 24 the statutory language of Section 256 and "construe[d] the term 'error' to extend to mistakes, whether  
 25 deceptive and 'dishonest' or merely uninformed and 'honest.'" *Stark*, 119 F.3d 1551, 1555 (Fed. Cir.  
 26 1997). The Federal Circuit held that:

27  
 28 <sup>12</sup> In its discussion of the various grounds for dismissal asserted in the Second Motion, the Court uses the term  
 "Fuisz Pharma Defendants" to apply to the Defendants against whom a particular claim has been asserted in the  
 FAC.

1 [S]ection 256 allows deletion of a misjoined inventor whether that error occurred by  
2 deception or by innocent mistake. As well, the section allows addition of an unnamed  
3 actual inventor, but this error of nonjoinder cannot betray any deceptive intent by that  
4 inventor. In other words, the statute allows correction in all misjoinder cases  
featuring an error and in those nonjoinder cases where the unnamed inventor is free of  
deceptive intent.

5 *Id.* at 1555.<sup>13</sup> In *University of Colorado Foundation, Inc. v. American Cyanamid Co.*, 196 F.3d 1366,  
6 1374–75 (Fed. Cir. 1999) (“*Cyanamid*”), the Federal Circuit confirmed that Section 256 may be used  
7 to correct inventors where deception existed. Relying on *Stark*, the Federal Circuit held in *Cyanamid*  
8 that “the district court’s premise—that the actual inventors could not be substituted for a fraudulently-  
9 named inventor in a patent without thereby invalidating the patent—was incorrect.” *Cyanamid*, 196  
10 F.3d at 1375. In the underlying case, plaintiffs had alleged that “Cyanamid wrongfully copied the  
11 article into a patent application and filed the application in its own name without informing Plaintiffs,  
12 without naming the doctors as the inventors and naming instead Cyanamid’s employee . . . as sole  
13 inventor.” *University of Colorado Foundation, Inc. v. American Cyanamid Co.*, 974 F. Supp. 1339,  
14 1342 (D. Colo. 1997). Thereafter, on February 14, 1984, a patent was issued to Cyanamid. *Id.*  
15 Plaintiffs did not discover the existence of the patent until June 1993. *Id.* Such a factual circumstance  
16 falls squarely within Section 256.

17 Based upon Federal Circuit precedent, Fuisz Pharma Defendants’ contention that Section 256  
18 “is limited to the correction of errors involving true joint ownership” lacks merit. A Section 256  
19 claims includes both scenarios. The Court finds no meaningful distinction between the facts in  
20 *Cyanamid* as set forth in the compendium of cases regarding that action.

21 Accordingly, the Court finds that there are sufficient facts stated to allege a claim for  
22 correction under Section 256. The Court **DENIES** the Second Motion to Dismiss the first claim for  
23 correction of inventors.

24  
25  
26 <sup>13</sup> In *Stark*, plaintiff alleged he was “sole or a joint inventor of the subject matter claimed in the patents and  
27 requested correction of inventorship in accordance with 35 U.S.C. [section] 256.” *Stark v. Advanced  
28 Magnetics, Inc.*, 29 F.3d 1570, 1572 & 1576–77 (Fed. Cir. 1994) (vacating and remanding grant of summary  
judgment on correction claims to determine the merits of asserted inventorship claims).

## 2. **Claim for Declaratory Judgment Based on Invalidity and Unenforceability of the '612 Patent**

Fuisz Pharma Defendants next raise the issue of whether sufficient allegations are pled to state a claim for invalidity or unenforceability of Plaintiffs' claim of declaratory judgment. In determining whether sufficient facts are stated such that the claim is plausible, the court must presume all factual allegations are true and draw all reasonable inferences in favor of Plaintiffs. *Twombly*, 550 U.S. at 570; *Iqbal*, 129 S.Ct. at 1949; *Usher*, 828 F.2d at 561. The parties agree that to survive the motion to dismiss on this declaratory relief claim, Plaintiffs must have pled sufficient facts as to invalidity and unenforceability. Second Motion at 7; Second Opp. at 9. Under 35 U.S.C. section 102(f), a person is not entitled to a patent if "he did not himself invent the subject matter sought to be patented," or, in other words, if he is not the true inventor. Section 102(f) applies where: someone other than the claimed inventor conceived of the invention prior to the claimed inventor; and the prior conception was communicated to the alleged inventor. *Eaton Corp. v. Rockwell Int'l Corp.*, 323 F.3d 1332, 1344 (Fed. Cir. 2003). "To prevail on a claim of inequitable conduct, the accused infringer must prove that the patentee acted with the specific intent to deceive the PTO," and that the misrepresented or omitted information was material. *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1290 (Fed. Cir. 2011) ("Intent and materiality are separate requirements."). The general materiality standard required to establish inequitable conduct is "but-for materiality." *Id.* at 1291. However, misconduct will be deemed material if a patentee "engage[s] in affirmative acts of egregious misconduct, such as the filing of an unmistakably false affidavit." *Id.* at 1292.

20 Fuisz Pharma Defendants argue the complaint contains conclusory allegations and “nothing  
21 more than a recitation of statutory language of the Patent Laws.” Second Motion at 8. Fuisz Pharma  
22 Defendants also contend that the basis for unenforceability—inequitable conduct—has not been pled  
23 with required specificity under Fed. R. Civ. P. 9(b). *Id.* at 8–10 (Plaintiffs fail to identify the specific  
24 who, what, when, where, and how of the material misrepresentations or omissions to the PTO, and do  
25 not allege sufficient facts regarding the requisite intent to deceive). Plaintiffs disagree.

26 The Court agrees that Plaintiffs have sufficiently pled that the '612 Patent is invalid and  
27 unenforceable based on Fuisz Pharma Defendants' inequitable conduct. Plaintiffs allege: Richard  
28 and Joseph intended to deceive the PTO into believing they were sole inventors of the '612 Patent, but

1 they were not; Holmes and/or Kemp should have been named inventors of the patent and Richard and  
 2 Joseph knew that Holmes and/or Kemp should have been so named; their deception was material  
 3 because in the Declaration and Power of Attorney for Patent Application, submitted to the PTO in or  
 4 about September 2009, they falsely declared that they were the original, first, and sole inventors in the  
 5 patent's application; the PTO would not have issued the patent if it had known that Holmes and/or  
 6 Kemp should have been listed as inventors, that Richard and Joseph should not have been named  
 7 inventors, or that claimed limitations from the '612 Patent were inaccurately represented as their  
 8 work. FAC ¶¶ 98–104; Second Opp. at 11. These allegations, along with the entire FAC, sufficiently  
 9 allege a plausible claim for invalidity that permit the court to draw a reasonable inference that the  
 10 defendant is liable for the misconduct alleged. *See* Second Motion at 7 (citing *Iqbal*, 129 S. Ct. at  
 11 1940 and *Twombly*, 550 U.S. at 566). These allegations sufficiently satisfy the “who, what, when,  
 12 where, and how” of the alleged misrepresentations made by Richard and Joseph to the PTO.<sup>14</sup>

13 For these reasons, Fuisz Pharma Defendants' Motion to Dismiss the second claim for  
 14 declaratory judgment based on invalidity and unenforceability of the '612 Patent is **DENIED**.

15 **3. Whether Plaintiffs' Federal Claims Are Duplicative of an Interference  
 16 Proceeding**

17 Fuisz Pharma Defendants further argue that the Court should refuse jurisdiction of the  
 18 federal claims because these claims involve a “dispute[] over inventorship” that is more appropriately  
 19 heard by the PTO. Second Motion at 10. These defendants argue that the “issues are currently before  
 20 the PTO” because Plaintiffs filed “copied claims” of the '612 Patent with the PTO (seven days after  
 21 this action began) “with the goal of provoking an interference proceeding and establishing priority of  
 22 inventorship.” *Id.*; *see also* Second Reply at 6. At the hearing, Fuisz Pharma Defendants conceded  
 23 that an interference proceeding was not pending. The Court finds the lack of an actual interference  
 24 proceeding determinative. As such, Fuisz Pharma Defendants' Motion to Dismiss the first and second  
 25 claims as duplicative is **DENIED**.

26 <sup>14</sup> Fuisz Pharma Defendants also make a cursory request that the Court strike allegations in the FAC relating to  
 27 a claim for invalidity based on prior art. Second Reply at 7. Fed. R. Civ. P. 12(f) permits a court to “strike  
 28 from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fuisz  
 Pharma Defendants do not make any attempt to argue that Rule 12(f) actually applies. According, the request  
 to strike is **DENIED**.

**4. Whether the California Uniform Trade Secrets Act Supersedes the State Law Claims**

Lastly, Fuisz Pharma Defendants request that the Court dismiss all the common law claims on the ground that they are preempted by the California Uniform Trade Secrets Act (“CUTSA”). Fuisz Pharma Defendants argue that Plaintiffs’ allegations for misappropriation of confidential or proprietary information necessarily states a claim under CUTSA which would then supersede all of Plaintiffs’ common law claims. Second Motion at 11–13 (citing *Silvaco Data Systems v. Intel Corp.*, 184 Cal. App. 4th 210 (Cal. Ct. App. 2010)). Because Plaintiffs do not affirmatively assert any claims under CUTSA, the Court must decide therefore whether to infer such a claim.

Fuisz Pharma Defendants’ proffered authorities are not on point. In each case offered, the plaintiffs had asserted claims for trade secret misappropriation. Here, no such allegations exist. Rather, the claims are either based on the wrongful issuance of or retention of benefits derived from the ’612 Patent or breaches of fiduciary duties or contract—not the actual misappropriation of a trade secret. Second Opp. at 16–18. Fuisz Pharma Defendants’ suggestion that *Silvaco* and *Heller v. Cepia, LLC*, No. C 11-01146 JSW, 2012 WL 13572, at \*7 (N.D. Cal. Jan 4, 2012), should be extended to infer a CUTSA claim is misplaced. Second Reply at 9. Their argument wrongly assumes that Plaintiffs must allege a property right in the Confidential Information in order to support the state law claims.<sup>15</sup> While it is true that Attorney John’s alleged taking of information is central to the FAC and serves as an underlying factual basis for all claims, Plaintiffs do not bring a conversion claim requiring the identification of property rights. *See Gabriel Tech. Corp. v. Qualcomm Inc.*, No. 08cv1992-MMA(POR), 2009 WL 3326631, at \*11 (S.D. Cal. Sep. 3, 2009) (CUTSA does not supersede claims “where the facts in an independent claim are similar to, but distinct from, those underlying the misappropriation claim”). These claims seek to address Plaintiffs’ rights and remedies separate and aside from Attorney John’s alleged misappropriation.

<sup>15</sup> The *Silvaco* court stated that a plaintiff making a *conversion* claim “must identify some *property* in which he had *property rights* with which the defendant could, and did, interfere.” 184 Cal. App. 4th at 238. Here, Plaintiffs do not assert a conversion claim.

1 For the reasons set forth above, Fuisz Pharma Defendants have failed to provide any authority  
 2 that the Court should infer the existence of a CUTSA claim. Accordingly, the Second Motion to  
 3 Dismiss is **DENIED** as to the third, fifth, seventh, ninth, and tenth claims on these grounds.

4 **5. Statute of Limitations**

5 **a. Application of Section 340.6 to Third, Fifth, Seventh, Ninth, and**  
 6 **Tenth Claims Against Fuisz Pharma Defendants**

7 With respect to the statute of limitations, the Fuisz Pharma Defendants request  
 8 that the Court dismiss all claims stemming from the claim of legal malpractice against Defendant  
 9 Attorney John on the ground that if said claim is time-barred against Attorney John, it should also be  
 10 time-barred against them. The question raised is whether the one-year statute of limitations for legal  
 11 malpractice or the more general three-year statute applies to Fuisz Pharma Defendants.

12 The one-year statute in Section 340.6 explicitly applies to “action[s] against an attorney for a  
 13 wrongful act or omission . . . arising in the performance of professional services.” Fuisz Pharma  
 14 Defendants have provided the Court with no compelling authority extending Section 340.6 to claims  
 15 against non-lawyers.<sup>16</sup> Instead, they argue that the gravamen of all the claims are for legal  
 16 malpractice because the injury suffered is by reason of Attorney John’s alleged malpractice or breach  
 17 of fiduciary duties as a lawyer. Second Motion at 17.

18 The Court finds the fifth claim for aiding and abetting breach of fiduciary duties is based upon  
 19 the same operative set of facts as the claim for breach of fiduciary duties claim itself.<sup>17</sup> Accordingly,  
 20 the Second Motion to Dismiss the fifth claim for aiding and abetting breach of fiduciary duties is

21 <sup>16</sup> The court in *Quintilliani v. Mannerino*, cited by Fuisz Pharma Defendants, involved a different situation  
 22 where an attorney agreed to provide both legal and non-legal (consulting) services under an independent  
 23 contractor agreement. 62 Cal. App. 4th 54, 63 (Cal. Ct. App. 1998). While the court held that a claim for  
 24 negligence as to the non-legal services was not subject to Section 340.6, the claims for breach of contract,  
 25 breach of fiduciary duties, and negligent misrepresentation *were* barred by Section 340.6 because the contract  
 26 for legal and non-legal services was “inextricably intertwine[d]” and fiduciary obligations “arose solely from  
 27 the[] attorney-client relationship[.]” *Id.* at 67–68. Further, the “intermingling of alleged legal and non[-]legal  
 28 misrepresentations in [the negligent misrepresentation claim] should lead to the application of section 340.6.”  
*Id.* at 69. This case is distinguishable from the case at hand, where non-attorneys Fuisz Pharma Defendants  
 seek to have Section 340.6 applied to them.

29 <sup>17</sup> The parties agree that the statute of limitations for breach of fiduciary duties, as alleged against Attorney  
 30 John, is also one year.

1 **GRANTED.** Because the parties have not briefed the issue of whether an aiding and abetting claim  
2 may survive when the underlying claim upon which the aiding and abetting claim is based has been  
3 dismissed on statute of limitations grounds, this dismissal is **WITH LEAVE TO AMEND** if Plaintiffs  
4 have legal authority to re-plead aiding and abetting as an independent claim.

5 As to the third, seventh, ninth, and tenth claims, the Second Motion to Dismiss is **DENIED**.  
6 Those claims are separate and distinct from a claim of legal malpractice or breach of fiduciary duties.  
7 As such, the Court will not extend the one-year statute to the Fuisz Pharma Defendants.<sup>18</sup>

**b. Application of the Three-Year Statute of Limitations for CUTSA Claims**

10 Fuisz Pharma Defendants contend that the Court should dismiss the third, fifth,  
11 seventh, ninth, and tenth claims against them because they are barred by CUTSA's three-year statute  
12 of limitations under Cal. Civ. Code section 3426.6. Second Motion at 18. For the reasons set forth  
13 above, CUTSA does not supersede any of the state law claims asserted against Fuisz Pharma  
14 Defendants. Accordingly, the Second Motion is **DENIED** on this ground.

**c. Remaining Statute of Limitations Issues**

While most of the parties' arguments applied globally, a few remain.

**i. Unjust Enrichment (Third Claim)**

18 As alleged, the FAC focuses this claim on the benefits and gains received  
19 for the '612 Patent itself. FAC ¶¶ 105–10. Plaintiffs argue that with respect to this claim in  
20 particular, the two-year statute of limitation pursuant to Cal. Code of Civil Procedure section 339(1)  
21 applies and runs from November 2010—when the '612 Patent issued. Second Opp. at 23. Fuisz  
22 Pharma Defendants' cursory argument that the statute should run from the date the Fuisz Provisional

25       <sup>18</sup> The Court notes, however, that a claim for “civil conspiracy” does not exist. *Applied Equipment Corp. v.*  
26       *Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510–11 (1994) (“Conspiracy is not a cause of action, but a legal  
27       doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with  
28       the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a  
coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the  
conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors.”) Here,  
Plaintiffs already seek direct liability from Richard and Joseph as direct tortfeasors, and the fiduciary duty,  
malpractice, and contract claims against Attorney John are time-barred.

1 which was published in January 2008 lacks merit because the date is arbitrary in that it does not bear  
2 any reasonable relation to the actual claim being brought. Second Reply at 14 n.4.

3 For these reasons, the Court **DENIES** the Second Motion to the extent that Fuisz Pharma  
4 Defendants assert that the third claim is time-barred.

5 **ii. Unfair Competition and Unfair Business Practices (Seventh  
6 Claim)**

7 As discussed with respect to Attorney John, the seventh claim is pled as a  
8 common law claim for unfair competition and unfair business practices. Plaintiffs contend that this  
9 claim is subject to a four-year statute of limitations because it is brought under the UCL and further  
10 confirmed their position at the hearing. Second Opp. at 21–22 & n. 11.

11 The Court hereby **DISMISSES** the seventh claim **WITH LEAVE TO AMEND** for Plaintiffs to  
12 properly plead the basis of this claim against Fuisz Pharma Defendants, to the extent one exists.

13 **iii. Inducing Breach of Contract and Tortious Interference with  
14 Contractual Relations (Ninth Claim)**

15 As an alternative to the one- and three- year statutes of limitations, Fuisz  
16 Pharma Defendants contend this claim should be barred by the two-year statute of limitations under  
17 Section 339(1). Second Motion at 17–18. The issue here is when the statute was triggered.

18 The Fuisz Pharma Defendants assert the statute was triggered in January 2008, when the Fuisz  
19 Provisional was published because, at that time, a specific monetary value was conveyed to Richard  
20 and Joseph, causing injury to Plaintiffs. Second Reply at 14. Plaintiffs argue that claim did not arise  
21 until November 2010 when the '612 Patent was issued. Second Opp. at 24.

22 For the reasons set forth above, the Court finds that the statute began to run no later than  
23 October 28, 2008 when Plaintiffs, by their own allegations, had reason to know that Fuisz Pharma  
24 Defendants had induced a breach of contract or knew that they had tortiously interfered with the  
25 contract. *See* Section II.B.2. Because of the Law Firm Response, Plaintiffs had reason to believe that  
26 Attorney John had taken the Theranos Confidential Information and provided it to his father and  
27 brother, and that they had used the information in filing the Fuisz Provisional. FAC ¶ 71. As such,  
28 Plaintiffs necessarily knew of the basis of the ninth claim by that date as well.

1           Accordingly, because the lawsuit was filed more than two years after October 28, 2008, the  
2 Second Motion to Dismiss as to the ninth claim is **GRANTED** as time-barred.

3           **III. CONCLUSION**

4           For the foregoing reasons, the Court **GRANTS** the First Motion to Dismiss and **GRANTS IN**  
5 **PART AND DENIES IN PART** the Second Motion to Dismiss. More specifically, the Court rules as  
6 follows:

- 7           • The fourth claim for breach of fiduciary duties, fifth claim for aiding and abetting  
8           breach of fiduciary duties, sixth claim for legal malpractice, eighth claim for breach of  
9           contract, and tenth claim for civil conspiracy against John Fuisz are **DISMISSED**  
10           **WITHOUT LEAVE TO AMEND**. The seventh claim for unfair competition/unfair  
11           business practices against John Fuisz is **DISMISSED WITH LEAVE TO AMEND**.
- 12           • The Second Motion to Dismiss as to the first claim for correction of inventors (against  
13           Fuisz Pharma, Richard Fuisz, and Joseph Fuisz), second claim for declaratory  
14           judgment based on invalidity and unenforceability of the '612 Patent (against Fuisz  
15           Pharma), and third claim for unjust enrichment (against Fuisz Pharma, Richard Fuisz,  
16           and Joseph Fuisz) is **DENIED**.
- 17           • The fifth claim for aiding and abetting breach of fiduciary duties (against Richard  
18           Fuisz and Joseph Fuisz) and seventh claim for unfair competition/unfair business  
19           practices (against Fuisz Pharma, Richard Fuisz, and Joseph Fuisz) are **DISMISSED**  
20           **WITH LEAVE TO AMEND**.
- 21           • The ninth claim for inducing breach of contract/tortious interference with contractual  
22           relations (against Richard Fuisz and Joseph Fuisz) and tenth claim for civil conspiracy  
23           (against Richard Fuisz and Joseph Fuisz) are **DISMISSED WITHOUT LEAVE TO**  
24           **AMEND**.

1 Plaintiffs have **twenty-one (21) days** from the date of this Order to file a Second Amended  
2 Complaint. Thereafter, Defendants have **twenty-one (21) days** from the date of service to respond.  
3 This Order terminates Dkt. Nos. 62 & 65.

4 **IT IS SO ORDERED.**

5 Dated: June 26, 2012  
6

  
7 **YVONNE GONZALEZ ROGERS**  
8 **UNITED STATES DISTRICT COURT JUDGE**